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Supreme Court of the United States

October Term, 1978

No. 78-170

BOARD OF EDUCATION, BRATENAHL, OHIO, LOCAL SCHOOL DISTRICT,
Petitioner,

vs.

STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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STATE BOARD OF EDUCATION OF OHIO, DEPARTMENT OF EDUCATION OF OHIO, FRANKLIN B. WALTER, *Superintendent of Public Instruction and Secretary, State Board of Education,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Board of Education of the Bratenahl, Ohio, Local School District petitions this Court to issue its writ of certiorari to review the judgment of the Supreme Court of Ohio in Cause No. 77-172 on the docket of that court.

OPINIONS

To understand the nature and depth of the denial of due process by the State of Ohio that summarily (unless this Court shall adjudge to Bratenahl the constitutional

protection it claims) destroys the Bratenahl school system and takes its physical property, it is important to note, not only the opinion in the case that now comes here for review, but also the opinions and judgments in prior litigation of the same issue between these parties, *viz.*:

A. In This Proceeding, the State of Ohio Has Undertaken to Destroy the 80-Year Old Bratenahl School System, and to Take Its Property, Without the Due Process Guaranteed by the Fourteenth Amendment

The summary dissolution of the Bratenahl District, and the seizure of Bratenahl's property, without judicial review, was upheld by a 4-to-3 decision in the Supreme Court of Ohio:

> "despite the fact there was no notice or opportunity to be heard afforded Bratenahl." 53 Ohio St. 2d at 177, 373 N.E.2d at 1242, A116.

The opinion of the Supreme Court of Ohio, written by Mr. Justice Sweeney, concurred in by Mr. Chief Justice O'Neill and Justices Herbert and William B. Brown, over the dissent of Justices Celebrezze, Paul W. Brown and Locher, is reported in 53 Ohio St. 2d 173, 373 N.E.2d 1238. It is reproduced in the Appendix, printed under separate cover, at page A111.

The opinion of the Court of Appeals of Franklin County, Ohio, upon a 2-to-1 division, by Judges Whiteside and Strausbaugh with Judge Holmes dissenting (which the Supreme Court of Ohio reversed) is not officially reported but is reproduced in the Appendix A81, as is the unreported opinion of the trial court (which the Court of Appeals reversed) written by Judge Gillie, sitting in the Common Pleas Court of Franklin County, Ohio. A78.

B. The State of Ohio Has Also Denied Bratenahl Due Process by Stripping It, Without Notice or Opportunity to Be Heard, of Rights Adjudicated and Vested by Final Judgments in Prior Litigation Between the Same Parties on the Same Issue

The administrative order of February 9, 1970, issued without notice, hearing, or judicial review, A15, strips Bratenahl of rights (1) subsequently adjudged and vested in statutory review proceedings by final judgment entered August 24, 1973, A45 (vacating that order, issued 3-1/2 years earlier) and (2) subsequently adjudged and vested in a separate declaratory judgment action by final judgment entered August 30, 1973, A67, that "the Bratenahl Local School District legally exists." Thus:

1. Upon statutory review, Ohio's 1970 dissolution order was vacated by final judgment in 1973, before the present proceeding was commenced

Ohio's February 9, 1970, order, which, if enforced, would result in the dissolution and seizure of the Bratenahl District, was vacated in statutory review proceedings, before Ohio commenced the present proceedings. The review proceedings that resulted in final judgment on August 24, 1973, vacating the February 9, 1970, order followed this course:

On April 23, 1970, Judge Marshall in the Common Pleas Court of Franklin County, Ohio, held the order of February 9, 1970, "was not an adjudication nor was it a final appealable order," and dismissed Bratenahl's appeal in an unreported opinion reproduced in the Appendix at page A18.

On May 26, 1970, the Court of Appeals of Franklin County, Judges Troop, Strausbaugh and Stern,

stayed enforcement of the February 9, 1970, order in an unreported opinion reproduced in the Appendix at page A22.

On April 27, 1971, the Court of Appeals of Franklin County, Judges Strausbaugh, Troop and Holmes, reversed the dismissal of the statutory appeal, holding (1) the trial court did have subject matter jurisdiction, (2) the February 9, 1970, State Board order was an "adjudication", and appealable, (3) adjudging that appeals of "any" State Board action is statutorily mandated under R.C. 3301.13, A51, and (4) remanding the case to the trial court, in an unreported decision reproduced in the Appendix at page A24.

On June 14, 1971, Judge Wright in the Franklin County Common Pleas Court suspended the dissolution order and "any other order * * * which would terminate the existence of the Bratenahl School District," in an unreported order reproduced in the Appendix at page A29.

On August 23, 1971, the Supreme Court of Ohio denied the State Board's motion for a restraining order (to prevent Bratenahl from operating the high school it was to open on September 7, 1971) in an unreported order reproduced in the Appendix at page A30.

On September 22, 1971, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the judgment of the Court of Appeals, which had adjudged the February 9, 1970, order to be an appealable "adjudication" in an unreported order reproduced in the Appendix at page A31.

On April 3, 1972, Judge Marshall in the Common Pleas Court of Franklin County dismissed Bratenahl's appeal and vacated the stay, in an unreported opinion reproduced in the Appendix at page A32.

On September 6, 1972, the Court of Appeals of Franklin County, Judges Troop, Whiteside and Reilly, enjoined the State Board "from enforcing any orders in existence which purport to affect the legal existence of appellant Board of Education, Bratenahl Local School District," in an unreported opinion reproduced in the Appendix at page A34.

On January 9, 1973, the Court of Appeals of Franklin County, Judges Holmes, Whiteside and Reilly, held (1) "Bratenahl in fact does exist and is operating as a school district and, at present maintains schools with grades 1 through 12 inclusive" as required by statute and (2) reversed the decision of the Common Pleas Court, in an unreported opinion reproduced in the Appendix at page A36.

On April 20, 1973, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the adjudication that Bratenahl complies with the twelve grade statute, in an unreported order reproduced in the Appendix at page A43.

On August 8, 1973, Judge Shoemaker in the Common Pleas Court of Franklin County, upon remand from the Court of Appeals, vacated the February 9, 1970, order in an unreported decision reproduced in the Appendix at page A44.

The statutory review thus terminated in a final judgment (from which no appeal was taken) freeing Bratenahl from any charge it was not operating in compliance with Ohio Revised Code §3311.29, A4, the only requirement of which was that the school system maintain "grades one through twelve * * *."

In reliance thereon, Bratenahl, which since September 1971 had operated twelve grades, including a high school, A-v, Item 21, voted bonds and built a new building specially designed for its high school. The new high school building was opened in September, 1975, A-ix, Item 41, and has since housed the Bratenahl high school. Seven classes have now been graduated from the high school. This is the high school the Ohio Supreme Court, in the judgment tendered for review held ceased to exist, eight years earlier, in 1970.

2. In a separate declaratory judgment action, before the proceeding now here for review was commenced, it was adjudicated by final judgment that the Bratenahl Local School District legally exists

Bratenahl filed a separate declaratory judgment action in the Common Pleas Court of Franklin County on November 29, 1971, A47. It resulted, before the present proceeding now here for review was commenced, in a final judgment adjudicating that the Bratenahl Local School District legally exists. That separate litigation found its way to final judgment in the following manner:

On April 29, 1972, the Common Pleas Court of Franklin County, in an opinion by Judge Marshall, dismissed Bratenahl's declaratory judgment suit, in an unreported opinion reproduced in the Appendix at page A52.

On January 9, 1973, the Court of Appeals of Franklin County, Judges Holmes, Whiteside and Reilly, reversed the dismissal by the Common Pleas Court of Bratenahl's declaratory judgment suit, in an unreported opinion reproduced in the Appendix at page A57.

On April 20, 1973, the Supreme Court of Ohio overruled the State Board's motion to certify, thus refusing to review the Court of Appeals adjudication that Bratenahl's declaratory judgment action should be remanded for decision on the merits, in an unreported order, reproduced in the Appendix at page A65.

On August 30, 1973, on remand from the judgment of the Court of Appeals, Judge Shoemaker in the Common Pleas Court of Franklin County, entered judgment that "Bratenahl Local School District does legally exist" in an unreported entry reproduced in the Appendix at page A67.

No appeal was taken from the final judgment in the statutory review proceedings or from the final judgment in the separate declaratory judgment action.

C. In the Present, Subsequently Commenced Proceeding Now Here for Review, the State of Ohio Has Further Deprived Bratenahl of Due Process by Depriving It of Rights Under the Prior Judgments

After the 1973 final judgments had been entered in the statutory review proceeding vacating the dissolution order of February 9, 1970, A45, and in the declaratory judgment suit adjudging the Bratenahl system legally exists, A67, the State, finding that:

"*On July 1, 1968*, the Bratenahl Local School District did not maintain within such district public schools

consisting of grades one through twelve, inclusive, as required by Section 3311.29, Ohio Revised Code" A4,

issued the October 14, 1974 order here in suit:

"that the Bratenahl Local School District, Cuyahoga County, be hereby dissolved" A69,

and that:

"the funds, property, and indebtedness of said Bratenahl Local School District be transferred to the Cleveland City School District effective as of November 1, 1974 * * *." A76.

This new order of dissolution led to the litigation that now comes here for review. It proceeded as follows:

On December 16, 1975, Judge Gillie, in the Common Pleas Court of Franklin County, upheld the fresh order of October 14, 1974, dissolving the Bratenahl school system as of November 1, 1974, in an unreported opinion reproduced in the Appendix at page A78.

On December 16, 1976, the Court of Appeals of Franklin County reversed and vacated the October 14, 1974, dissolution order in an unreported opinion reproduced in the Appendix at page A81.

On March 22, 1978, the Supreme Court of Ohio reversed, *sua sponte*, on the ground the February 9, 1970, order (which had been adjudicated by final judgments in the prior proceedings) was not "an adjudication" and not "appealable" even though its effect was to dissolve the Bratenahl school district and to take its property. 53 Ohio St. 2d 173, 373 N.E.2d 1238, A111.

JURISDICTION

The judgment of the Supreme Court of Ohio was dated and entered March 22, 1978, A111; rehearing was denied May 5, 1978, A151.

This Court has jurisdiction to review under 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

This case brings here for review the questions:

1. Whether a State denies due process within the meaning of the Fourteenth Amendment when, without notice or hearing, and without judicial review, it orders dissolved an 80-year old public school district and orders its assets transferred to another district.
2. Whether a State denies due process within the meaning of the Fourteenth Amendment when it denies *res judicata* effect to prior final judgments on the same issue between the same parties.
3. Whether a State denies due process within the meaning of the Fourteenth Amendment when it applies prior law, subsequently changed, and fails to apply the law in effect at the time of decision.

CONSTITUTION, STATUTES AND REGULATIONS

This case turns on:

—The Constitution

The Constitution of the United States in its Fourteenth Amendment, §1, says:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

—The Statute

Ohio Revised Code §3311.29, in effect when the order of February 9, 1970 (which was upheld by the Ohio Supreme Court) issued, provides, so far as is here material:

> "after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve * * *." A4.

This statute was amended effective September 30, 1975, to omit the critical date July 1, 1968. A77.

—The Regulations

In 1957, regulations adopted by the Ohio State Board of Education pursuant to Ohio Revised Code §3301.07, provided in §II(d) that a high school:

> "shall have an enrollment of not less than 240 pupils * * *." A1.

At the time Bratenahl sought to establish its high school, in 1970, this requirement had been deleted and in lieu thereof, a new regulation (Standard EDb-403-02, paragraph (C)(14)) had been adopted requiring instead, that a new high school must offer "at least 55 units of credit * * *." A10.

STATEMENT OF THE CASE

Here, as upon an earlier day, it may be said:

> "you may destroy this little institution; it is weak; it is in your hands! * * * It is, Sir, as I have said, a small [school]. And yet there are those who love it!"[1]

The Bratenahl Local School District was organized in the 1890's:

> "In the late 1890's, Bratenahl, then a part of the city of Glenville, opted not to acquiesce in Glenville's decision to join the city of Cleveland. Concomitant with their formation as an autonomous local government, the residents of Bratenahl established their own independent school system, which they have maintained until this day." 53 Ohio St. 2d at 181, 373 N.E.2d at 1243, A120.

That school system is, and since 1968 has been, fully integrated; 27% of its students are black.

It now fights for its life.

Initially, Bratenahl operated only eight grades, kindergarten through grade 8. It did not have a high school.

—Genesis of the Problem

Ohio, on December 1, 1967, amended Ohio Revised Code §3311.29 to require that after July 1, 1968, no school district shall exist which does not maintain "grades one through twelve * * *." A4.

This threatened to end the Bratenahl school system.

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1. Daniel Webster in the *Dartmouth College* case (1819), 4 Wheaton 518, as reported in MILESTONES, page 105.

The reason was that Bratenahl had no high school, and could not establish one because regulations of the State Board then in effect required a high school to have "not less than 240 pupils * * *." A1.

This standard Bratenahl could not meet.

Bratenahl, therefore, sought exception A2, from the 12 grade requirement (which the State Board was authorized to grant, A4) and, as then required by the State Board, agreed that after a two-year extension, to July 1, 1970, of its existence as an eight grade district, Bratenahl would dissolve. A2.

—Then the Law Was Changed

The 240 pupil requirement was repealed.

In lieu of the 240 pupil requirement, the State Board by regulation substituted a new standard, authorizing a high school provided it should offer "at least 55 units of credit * * *." A10. (This was more than the 45 units of credit required of established high schools.) A10.

—The New Standard, Bratenahl Could Meet

Bratenahl commissioned a study by nationally recognized educational consultants and, with the aid of the graduate School of Education of the University of Akron, developed a program and a curriculum. A118.

Based upon its newly authorized opportunity to create its own high school, regardless of its size, Bratenahl, on January 28, 1970 and pursuant to R.C. 3311.29, requested from the State Board:

(1) Leave "to establish and implement a proposal for a high school program * * *." A11, and

(2) A 15 month extension of its existence, beyond July 1, 1970, to establish its high school.

—Leave to Establish High School Denied

The State Board summarily denied Bratenahl's application for leave to establish its high school. A15.

The State Board received the Bratenahl requests on February 6, 1970; on February 9, 1970—three days later—the State Board denied the requests, and did so without notice or hearing. A116. The legal effect of the February 9, 1970, decision (A15), was (1) to deny Bratenahl leave to establish a high school and (2) to dissolve the Bratenahl school system.

—Litigation Ensued

The order of February 9, 1970, was challenged in the courts:

(i) Upon statutory review, the February 9, 1970, order was vacated by final judgment

In statutory review proceedings described above (at pages 3 to 5), the dissolution order of February 9, 1970, was vacated by final judgment of August 24, 1973, from which no appeal was taken, A45.

(ii) In separate declaratory judgment suit Bratenahl was, by final judgment, on August 30, 1973, adjudicated legally to exist

The separate declaratory judgment suit (described above, pages 6 to 7) resulted in final judgment on August 30, 1973, adjudging that the Bratenahl Local School District legally exists, A67.

The dissolution order of February 9, 1970, having been vacated by final judgment, and the Bratenahl school district having been adjudicated by final judgment lawfully to exist—and with no litigation pending anywhere—Bratenahl residents voted a bond issue in 1974 and with the proceeds started construction of a new high school building in 1974. It was completed in 1975. A-ix, Item 41. Since then, the high school has been ocnducted in the new building.

—A New Attack Was Launched

The State—more than a year after the two final judgments of August, 1973—on October 14, 1974, issued a new dissolution order. A69. Its travel through the courts has been traced above. See pages 7 to 8.

As all parties recognized, the October 14, 1974, order launched a new proceeding. The Court of Appeals so regarded it. That court recognized that it had before it, not the February 9, 1970, dissolution order disposed of by final judgments in the prior litigation, but that, as the Court of Appeals put it:

> "*Thereafter*, the present proceedings were instituted to fulfill the State Board's desire to dissolve Bratenahl pursuant to R.C. 3311.29 by [State Board] resolution of September 10, 1973, indicating the Board's preliminary determination to dissolve Bratenahl . . ." (A84)[2],

under a yet to be held Administrative Procedure Act hearing.

The State Board was in agreement. It assured the Supreme Court of Ohio in the case that now comes here that:

> "the origin of this appeal *is the October 14, 1974, unanimous resolution and order* of the State Board which ordered the dissolution of the Bratenahl Local School District under Revised Code 3311.29 * * *."[3]

2. Emphasis supplied throughout.

—The Result in the Supreme Court of Ohio

The Supreme Court of Ohio, inexplicably and unexpectedly, focusing on the February 9, 1970, order, held Bratenahl thereby dissolved—eight years earlier—on July 1, 1970. Over three dissents, Mr. Justice Sweeney said:

> "This court concludes that the Bratenahl Local School District was properly dissolved *on July 1, 1970*, by the state board." 53 Ohio St. at 178, 373 N.E.2d at 1242, A117.

The February 9, 1970, order was not before the Ohio Supreme Court; it was not argued by the parties—they debated instead the validity of the new October 14, 1974, order brought before the Ohio Supreme Court in this, the second, statutory review.

Nevertheless, the Supreme Court of Ohio, *sua sponte*, held the February 9, 1970, order:

(1) Was not an "adjudication," although, as the Ohio Supreme Court also held, it destroyed the Bratenahl schools and took Bratenahl's property (Syllabus 1, A111), and

(2) Bratenahl had no "right to notice and hearing", even though its school was dissolved and its property taken (Syllabus 2, A112).

The denial of due process, thus unexpectedly arising under the Ohio Supreme Court's opinion, was challenged

3. State Board's brief on the merits in the Supreme Court of Ohio, p. 2.

by motion for rehearing, A121 and 145, which the Supreme Court of Ohio denied. A150.[4]

The result of the Ohio Supreme Court decision is a massive denial of due process that, for reasons to be stated, calls for review:

REASONS FOR GRANT OF WRIT

1. By state action, Bratenahl is destroyed and despoiled of its property. Administrative fiat and decision of the Supreme Court of Ohio have accomplished this taking. Each, constitutes State action within the meaning of the Fourteenth Amendment. This is the fulcrum on which this Court made turn the civil rights guaranteed by the Fourteenth Amendment. In the first of the great cases in this Court that accomplished the turnaround in the law of this land, *Shelley v. Kraemer* (1948), 334 U.S. 1, this Court held enforcement by the courts of racial deed restrictions *is* State action within the meaning of the Fourteenth Amendment. This Court held:

> "That the action of state courts and judicial officers in their official capacities *is to be regarded as action of the State* within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." 334 U.S. at 14.

Many other decisions establishing this point are collected, reviewed, and analyzed in *Shelley*. 334 U.S. at 14-20.

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4. Where, as here, a federal question unexpectedly arises upon the court's opinion the issue may be raised and preserved by petition for rehearing. *Saunders v. Shaw* (1917), 244 U.S. 317; *American Surety Co. v. Baldwin* (1932), 287 U.S. 156.

2. The most elementary demand of the due process, here denied, is notice and hearing. Here, as Mr. Justice Brandeis observed in *Brinkerhoff-Faris Trust & Savings Company v. Hill* (1930), 281 U.S. 673:

> "the practical effect of the judgment * * * is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." 281 U.S. at 678.

Fairness of procedure "is due process in the primary sense." 281 U.S. at 681.

Not only was the February 9, 1970, administrative order on which the Ohio Supreme Court made this case turn, entered by the State Board without notice or hearing, but, additionally, the Ohio Supreme Court, itself, gave neither notice nor opportunity for hearing that the case was to turn on an order which, in prior litigation, had been vacated and held for naught in two final judgments. The Ohio Supreme Court decision, itself, thus additionally deprived Bratenahl of notice, hearing or judicial review—even though that decision terminated the Bratenahl system and took its property.

Not even a d[illegible]license may be taken away without notice and heari[illegible] *Burson* (1971), 402 U.S. 535. Here, an 80-yea[illegible]ol system is destroyed and its property taken in [illegible]ce of this Court's holding (in another Ohio case), *Goss v. Lopez* (1975), 419 U.S. 565, that even a 10-day suspension of a high school student *requires notice and hearing*.

The most fundamental demand of due process is notice and hearing, as this Court's cases show:

> To evict a tenant, *Thorpe v. Housing Authority of the City of Durham* (1969), 393 U.S. 268;

To take back a gas stove and phonograph sold under conditional sales contracts on which $200 remained unpaid, *Fuentes v. Shevin* (1972), 407 U.S. 67;

To seize $63.18 of wages, *Sniadach v. Family Finance Corp. of Bay View* (1969), 395 U.S. 337;

To terminate public assistance payments, *Goldberg v. Kelly* (1970), 397 U.S. 254, 260-262, 264, 267-269.

In this case, to close down an 80-year old school and take its property, while "confronted with the issue of whether Bratenahl was entitled to notice and a hearing," 53 Ohio St. 2d at 176, 373 N.E.2d at 1241, A115, the Ohio Supreme Court blandly adjudged Bratenahl's eviction from its school system, and the seizure of its property, valid, without judicial review, and:

"despite the fact there was no notice or opportunity to be heard afforded Bratenahl." 53 Ohio St. at 177, 373 N.E.2d at 1242. A116.

3. Refusal to give res judicata effect to the two prior final judgments in earlier litigation between the same parties on the same issue is a denial of due process.

The February 9, 1970, order on which the Ohio Supreme Court made this case turn, was vacated and held for naught in two 1973 final judgments between the same parties on the same issue. To, in 1978, turn the clock back eight years to the February 9, 1970, order is as unlawful as this Court adjudged like disregard of earlier judgments in *McCullough v. Virginia* (1898), 172 U.S. 102. That case concerned the acceptance of Virginia bonds for taxes, a question which had been adjudicated in earlier litigation. This Court observed:

"Now, at the end of twenty-seven years from the passage of the act [authorizing the bonds and making them eligible for taxes], we are asked to hold that this guarantee of value, so fortified as it has been [by decisions of the courts], was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing." 172 U.S. at 108.

This court's reaction was: "Such a result is so startling that it at least compels more than ordinary consideration." 172 U.S. at 108-109.

This Court held the rights acquired under the prior judgments could not be denied. Said this Court:

"It is not within the power of a legislature to take away rights which have been once vested by a judgment." 172 U.S. at 123.

Rights under the prior judgments, the Court added, "could not constitutionally be taken away." 172 U.S. at 125.

This Court has so held whenever the question has arisen, as in:

Cromwell v. County of Sac (1876), 94 U.S. 351 where this Court ruled a prior judgment "constitutes an absolute bar to a subsequent action." 94 U.S. at 352.

Garfield v. Goldsby (1908), 211 U.S. 249, where this Court held "one who has acquired rights by an administrative or *judicial* proceeding cannot be deprived of them without notice and an opportunity to be heard." This Court added "The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, *is of the essence of due process of law.*" 211 U.S. at 262.

The Ohio Supreme Court's disregard of the prior judgments is the more inexplicable since the very issue on which the Ohio Supreme Court ruled—that the February 9, 1970, order was not an "adjudication" and not "appealable"—was *raised and rejected in the first statutory review.* A-IV, Item 18, and A30.

That holding in the prior review, i.e., that the February 9, 1970, order was an "adjudication" and "appealable" and that the court had jurisdiction to pass upon it, foreclosed further inquiry into that subject as *Baldwin v. Iowa State Traveling Men's Association* (1931), 283 U.S. 522 makes clear. In *Baldwin,* the claim was that a prior judgment was a nullity because the court issuing that judgment had no jurisdiction over defendant. This Court rejected that argument and held that the prior Court's determination of its jurisdiction was res judicata on the issue of that Court's jurisdiction, adjudging:

> "Public policy dictates * * * that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered *forever settled* as between the parties." 283 U.S. at 525.

This Court further held in *American Surety Co. v. Baldwin* (1932), 287 U.S. 156, at 166:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

This would be true even if the court's judgment in the earlier litigation (that it did have jurisdiction) were erroneous. *American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 165-166. The rule is, as this Court put it in *Angel v. Bullington* (1947), 330 U.S. 183, in an opinion by Mr. Justice Frankfurter:

> "That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata.*" 330 U.S. at 187.

One who has litigated an issue, this Court pointed out:

> "cannot begin all over again in an action involving the same issues before another forum in the same State." 330 U.S. at 190.

Prior to the instant case, the Supreme Court of Ohio adhered to these rules. *Claxton v. Simons* (1963), 174 Ohio St. 333, 189 N.E.2d 62.

4. Failure to give effect to changes in the law is a denial of due process. The Supreme Court of Ohio in making the case turn on the order of February 9, 1970, and adjudging Bratenahl dissolved because Bratenahl on *July 1, 1968,* maintained only eight grades and not grades 1 through 12, failed to give effect to the changes in the law *in effect at the time of its decision.* The law changed in two respects:

(1) The State standard requiring 240 pupils to allow the establishment of a high school was repealed and in its place was substituted a new standard requiring 55 units of credit. A1 and A10.

(2) The statute, Revised Code §3311.29, was amended effective September 30, 1975, *to eliminate* any reference to the here critical date, July 1, 1968. A77.

The Supreme Court of Ohio was obligated, as a matter of due process, to give effect to the law as it was, not on July 1, 1968 and prior thereto, but as it was on March

22, 1978, the date of the decision in the Supreme Court of Ohio:

Bradley v. School Board of the City of Richmond (1974), 416 U.S. 696, 711-721;

Thorpe v. Housing Authority of the City of Durham (1969), 393 U.S. 268, 282;

Hodges v. Snyder (1923), 261 U.S. 600, 602;

United States v. Schooner Peggy (1801), 1 Cranch 103, 110.

Hodges is particularly helpful.

Hodges held, in a due process context, that as here, state statutes governing the existence of school districts, are determinative of the rights of a school district, as of the *effective* dates of such statutes, and that prior inconsistent determinations of a school district's existence, whether derived by judgment or by statute, are superceded as here, by subsequent legislative enactments.

When the Supreme Court of Ohio decided this case, Bratenahl complied with every requirement of law. That is the law by which its right to live has to be judged.

CONCLUSION

The writ should issue:

(1) To preserve an 80-year old local school system in a community where the citizens have voted to tax themselves to build a new high school and have passed all necessary school levies,

(2) To vindicate the demand of due process that:

(a) Notice and hearing are essentials of due process;

(b) Rights under prior final judgments cannot summarily be taken away;

(c) The law to be applied is the law in effect at the time of the decision.

Respectfully submitted,

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